THE SUPREME COURT

Denham C.J.
Murray J.
Hardiman J.
McKechnie J.
Clarke J.

371/2011 & 375/2011

Between/

NOEL CALLAN

Plaintiff/Appellant

and

IRELAND and THE ATTORNEY GENERAL

Defendant/Respondent

JUDGMENT of Mr. Justice Hardiman delivered the 18th day of July, 2013.

Overview.

This is the plaintiff's Appeal from the judgment and order of the High Court (Hedigan J.) of 15th day of April, 2011, whereby it was held that the plaintiff was not serving a sentence of imprisonment, but was serving a "commutation". The importance of this distinction will shortly appear.

The plaintiff's incarceration.

The plaintiff, Noel Callan, has been in jail since the 27th June, 1985, a period of more than twenty-eight years. A small part of that period was spent on remand, charged with capital murder. This ended on the 3rd December, 1985 when he was convicted and sentenced to death for the capital murder of Garda Sergeant Patrick Morrissey. His imprisonment under sentence of death lasted from then until the 29th May, 1986, a period of about six months. On that day, the President of Ireland, acting on the advice of the Government, and pursuant to Article 13 of the Constitution, commuted the death sentence to Penal Servitude for forty years. About eleven years of his period in prison has been spent serving this, from the 29th May, 1986 to a date in 1997. In 1997 Penal Servitude was abolished and replaced with imprisonment, and the plaintiff has been imprisoned since 1997.

The plaintiff's claim in this case, at bottom, is one of great simplicity. He claims that he is undergoing a sentence. This sentence was originally one of death, commuted to one of forty years Penal Servitude. But Penal Servitude itself was abolished as a form of confinement by a statute of 1997 and it was provided that a person undergoing Penal Servitude should be treated as undergoing imprisonment: see s.11(5) of the Criminal Law Act, 1997. Accordingly, the plaintiff contends, he is a person who is required to be treated as one undergoing a sentence of imprisonment. But such a person is, by law, entitled to remission of his sentence, in accordance with law, specifically the Prison Rules 2007.

Section 11(5) of the Act of 1997 provides as follows:

> "(5) Any person who, immediately before the commencement of this Act was undergoing … a form of Penal Servitude shall, … be treated thereafter as if he or she were undergoing or liable to undergo imprisonment and not Penal Servitude for that term."

By Rule 59 of the Prison Rules 2007 (Statutory Instrument 252/2007):

> "A prisoner who has been sentenced to a term of imprisonment exceeding one month… shall be eligible, by good conduct, to earn a remission of sentence not exceeding one quarter of such term or aggregate."

Accordingly, says the plaintiff, he is entitled to a remission of at least one quarter of the original sentence and perhaps up to one-third by reason of the subsequent provisions of the Rule which it is unnecessary to consider here.

That is the plaintiff's fundamental claim. It was advanced on his behalf with elegance, precision and simplicity by Ms. Deirdre Murphy S.C. The simplicity with which it was advanced was the fruit of deep consideration of the case from every point of view and not in any sense a fatuous or artificial simplification.

Ms. Murphy also advanced three other arguments which are set out in the judgment about to be delivered by Mr. Justice Clarke. In my view, each of these arguments was in response to the actual or anticipated arguments of the State, which varied a good deal as the case proceeded. I do not propose to consider them here because I do not think it is necessary to do so and I consider that the plaintiff's fundamental case is and always has been the straightforward one summarised above.

But if the plaintiff's case is fundamentally simple and straightforward, the State's response to it has varied a great deal over time. It has assumed (in the main) three separate forms, as follows:

(1) These proceedings were commenced on the 24th September, 2007 and the Statement of Claim was delivered four days later. On the 6th December, 2007 the State filed its first Defence. At para. 2 of this Defence the State defendants pleaded that:

> "… the President of Ireland acting upon the advice of the government, as required by Article 13.9 of the Constitution, exercised his power pursuant to Article 13.6 of the Constitution to commute the plaintiff's punishment to Penal Servitude for forty years on the understanding of the government that the full sentence of forty years would be served without remission."

That is to say, the defendants accepted that the forty year period of incarceration which the plaintiff was ordered to serve was a "sentence" and indeed used that term, "sentence" in respect of it themselves. Accordingly, the State's initial defence was that the President had commuted the death sentence to Penal Servitude on condition that the "full sentence of forty years" would be served without remission.

This is a most important aspect of the case. When the action came on for trial before the High Court the parties were at one in that both sides regarded the plaintiff as being, in law, a prisoner sentenced to imprisonment for forty years. They disagreed only on whether the terms of the "sentence" were such as to exclude remission. This was the State's first defence. It was to change radically.

(2) On the third day of the hearing in the High Court the State adopted a new entirely different and radically contradictory position. Counsel for the State had called the evidence of a Mr. Kennedy, a Principal Officer in the Department of An Taoiseach. Mr. Kennedy produced from an official file the actual advice of the Government which it tendered in a letter dated the 29th May, 1986 from the Secretary of the Government to the President and,

of course, the actual instrument of the President whereby the sentence was commuted.

It was after this evidence had been received that the State put forward a completely new case. It now contended for the first time, four years after the action commenced, that the plaintiff was not serving "a sentence" at all. Instead, the State contended that he was "serving a commutation". Therefore he was outside the scope of the Prison Rules. He was not a prisoner who had been sentenced to a term of imprisonment; he was a prisoner who had been sentenced to death. The President's subsequent commutation was not a sentence. It was a "commutation".
This was the second defence.

Counsel for the State was quite open about what had occurred. In closing the case on the fourth day of the hearing at p.56 of the transcript he said:

> "I accept that I changed what had originally been my argument because I accept that in the course of the case it emerged that the evidence as to the precise document put before the President was not what I expected it to be."

In view of this startling statement it seems appropriate to set out the terms of relevant document. The advice of the Government to the President dated the 29th May, 1986 was as follows:

> "At a meeting held today, the Government decided to advise the President in the exercise of the power vested in him by Article 13.6 of the Constitution to commute to Penal Servitude for forty years the

> sentence of death imposed by the Special Criminal Court on the 3rd December 1985 on Noel Callan on his conviction of the capital murder of Garda Sergeant Morrissey. Pursuant to that decision, I have been directed by the Taoiseach to convey the Government's advice to the President to commute the sentence of death accordingly."

It appears from this document that the aspect of the advice put before the President which caused such surprise to counsel for the State was that the advice did not specify that it was tendered on the understanding that the whole sentence would be served without remission. Accordingly, because that "understanding" was not included in the advice, it was not included in the President's Order commuting the sentence either.

I pause to express my astonishment at the turn of events which took place in the High Court. Counsel for the State was taken by surprise by the contents of a document which has been in the possession of the State continuously, at all times since it came into existence on the 29th May, 1986, twenty-seven years ago. It appears, accordingly, that counsel had not been briefed with this document, or had it otherwise drawn to his attention. The whole affair is rendered all the more surprising because Mr. Callan commenced his proceedings, not as plenary proceedings but as an application for an order in the nature of *Habeas Corpus* under Article 40 of the Constitution. The State, in its return to the conditional order exhibited *inter alia* both the order of the Special Criminal Court, the advice of the Government and the Presidential Order on foot of it, as part

of the documentation justifying the appellant's detention. It appears that this documentation was lost sight of in the intervening period, after Mr. Callan's first proceedings had been converted into plenary proceedings and the State's present Counsel was briefed.

Ms. Murphy S.C. characterised the State's change of front as a "complete *volte-face*" and it is impossible to disagree with that description.

(3) The State's second position - that the appellant was not a sentenced prisoner and was accordingly outside the scope of the Prison Rules - was not without its difficulties. It suggested that the prisoner was liable to be held in custody for forty years without being subject to the obligations of, or entitled to the protections contained in, the Prison Rules. It must be doubted whether that form of imprisonment would comply with the Constitution or with the State's international obligations. Accordingly, on the hearing of this Appeal the State adopted yet a third position which was this:

"The appellant is not a sentenced prisoner but *is* a person who is subject to the obligations of the Prison Rules, and entitled to the protections contained in those Rules <u>other than</u> Rule 59 about remission of sentence."

This is the State's third defence.

I have indicated above that the State's varying Defences to the Plaintiff's claim were "mainly" *based* on the three points summarised above. In the course of the argument, other points were canvassed, but very wisely not persisted with. For example, the State referred to the case of **Carney v. Ireland** [1957] IR 25 where it was held that the predecessor of Rule 59 of the Prison Rules did not apply to prisoners serving sentences of Penal Servitude. Accordingly, it was suggested, the provisions for remission could *never* have applied to the plaintiff during the period of years when he was undoubtedly serving a sentence (if he was serving a *sentence* at all) of Penal Servitude. Under considerable pressure from the Court, however, Counsel for the State took instructions and came up with the information that, notwithstanding the decision in the **Carney** case the authorities, that is the Government, had continued to apply the remission rules *as if* they applied to prisoners serving sentences of Penal Servitude. The legal basis of this, State Counsel said, is "not clear".

I wish to express my grave distaste for arguments such as the one just summarised. It was solemnly contended that, though the State itself ignored a decision of this Court and continued to apply the remission rules to Penal Servitude prisoners, the appellant was not entitled to claim the benefit of this practice because, *in point of law* a Penal Servitude prisoner was not *entitled* to remission, although in practice it was routinely granted.

The State's action in conniving at a situation in which actual practice deviated sharply from law, is gravely lacking in respect for the Courts and for anything resembling transparency. The State's action in bringing about a situation in which a citizen cannot, by consulting the laws of the country, come up with a reliable guide as to what the actual rights and obligations of individuals may be, is not one of which a court can approve. It shows little respect for the rule of law itself.

The barefaced technicality of this argument is breath taking. The remission provisions of the Prison Rules were found, fifty-six years ago, not to extend prisoners sentenced to Penal Servitude. It would have been quite possible to amend the Prison Rules but this was not done. Instead, it was decided simply to proceed as though the **Carney** case had never happened, to ignore a decision of the Supreme Court.

The State case continued in this way until Penal Servitude was itself abolished in 1997, forty years after **Carney** was decided. But, fourteen years later again, when the present plaintiff claimed that he was entitled to remission it was solemnly decided to rely on **Carney**, the case which the State itself had ignored for forty years, with a view to defeating this prisoner's claim to remission, or at least reducing the amount of remission accrued.

Details of the crime.

Although it is not strictly necessary for the resolution of this case, I consider it proper to set out a summary of the circumstances leading to the appellant's conviction of capital murder. I would not think it appropriate to withhold reference to the circumstances in which an unarmed member of the gardaí was callously murdered and to focus exclusively on the rights of a person convicted of that murder, important as those rights undoubtedly are.

On the 27th June 1985, the appellant, then twenty-two years old, was approached by an older workmate, Michael McHugh, with a plan to rob the Labour Exchange in Ardee. McHugh had procured guns. The two of them robbed the Exchange and made off with the money, first in the Manager's car and later on a motor bike.

The robbers crashed the motor bike into an oncoming car at a place called Rathbrist Cross. The appellant was injured in the collision. He made his way up a laneway to a farmhouse. As he reached the house he heard a shot. After a lapse of some further time, perhaps two or three minutes - he heard a second shot. The evidence at the trial was that the first shot was fired by McHugh and hit Sergeant Morrissey in the leg and, after what the presiding judge at the trial, Hamilton J. (as he then was), called "an appreciable interval", McHugh walked up to the

injured Sergeant Morrissey and shot him in the head. This was an act of cold blooded murder.

On this account (which was not contradicted) the appellant played no direct part in the shooting of the Sergeant. He was not physically present when it occurred but was some distance away and disabled having suffered head and leg injuries in the collision. He was however convicted of murder on the basis of common design. He might have argued that the common design extended only to the robbery and the firing of shots to frighten pursuers and that the deliberate killing of the already disabled Sergeant Morrissey was never in his contemplation but was a gratuitous act on the part of McHugh. That was a case which he could have put before the Court of Trial, but he did not do so. Instead, he gave perjured evidence to the effect that he had no involvement at all in the robbery or with McHugh in the death of the Sergeant. This denial was rejected and the conviction was upheld on appeal.

This perjured evidence was both criminal itself and extremely counterproductive. It cannot be excused but it is explained by the appellant on the basis that he entered Portlaoise Prison a week after McHugh and was assigned to a wing of the prison where McHugh and members of the INLA and other dissident groups were located. These included the notorious Dessie O’Hare. The appellant says that McHugh denied he was involved in the robbery and threatened him (Callan) against doing anything which would prejudice that

position. He says that "warning" was reinforced by others in the INLA faction. It is beyond dispute that this group included violent and dangerous men.

On any view of the case, however, the late Sergeant Morrissey emerges as a courageous, indeed heroic, servant of the State. He pursued armed robbers despite the obvious dangers of doing so and was subjected to a gratuitous but fatal assault by being shot in the head as he lay on the ground already disabled. His devoted service and death in heroic circumstances is commemorated by a dignified and prominent monument on the main street of Belturbet, Co. Cavan, his native place. He is remembered by many with affection, gratitude and admiration.

The State's eventual case.

In the course of argument, Mr. Paul O'Higgins S.C. for the State was able to disembarrass the State's position of the various contradictory and technicality-based arguments in which it had become entangled. He did this by clear headedly replacing the State's case on the only basis on which it was arguable. This was that the appellant was not serving a sentence at all but was "serving a commutation".

Expressed in terms of Rule 59 of the Prison Rules, 2007, this amounts to a contention that the appellant is not "a prisoner who has been sentenced to a term of imprisonment exceeding one month…". The appellant, said Mr. O'Higgins,

was a prisoner who was sentenced to death by the Special Criminal Court. The commutation of this sentence to one of Penal Servitude by the President is not itself a "sentence".

Difficulties.

There are obvious difficulties with this argument. The first is that, when the appellant challenged the legality of his detention by Article 40 proceedings, the Governor of the Prison produced to establish the legality of the appellant's detention, the order of the Special Criminal Court, which directed the appellant's detention prior to execution of the death sentence, *and* the advice of the Government to President Hillary in 1986, which is quoted earlier in this judgment, *and* the actual instrument of President Hillary dated the 29th of May, 1986 whereby he commuted the death sentence to Penal Servitude for forty years.

In other words, all of these instruments, and not simply the sentence of the Court, were relied upon as justifying the appellant's imprisonment.

The second difficulty is that, as we have seen from the first defence filed by the State, the forty year period of incarceration (to use a neutral term) was there described by the State itself as a "sentence".

Thirdly there is the fact that all prisoners sentenced to Penal Servitude for forty years since 1982 apart from three, one of whom is this appellant's co-accused, have in fact been released by executive action.

Fourthly there is the difficulty that the plaintiff is manifestly not a remand prisoner but a prisoner condemned to imprisonment for forty years. The State contend that he is not a sentenced prisoner at all. He must, therefore, if his detention if lawful at all, be regarded as a prisoner in an entirely novel category not so far identified in any statute, instrument, or judgment of the Court. The State say that this is exactly what he is: he is a prisoner "serving a commutation".

I believe that, in terms of logic, law and language, this is a nonsense. The word "commute" as it is used in Article 13.6 of the Constitution has a specific meaning. In the (dominant) Irish language version the expression "to commute… punishment" is expressed as "chun maolaithe pionós" which means "to mitigate punishment". But "commutation" is expressed in Irish as maolú (mitigation). The phrase "the right of pardon and the power to commute" is expressed in Irish as "ceart maithiúnais agus cumhacht chun maolaithe".

` Apart altogether from the Irish language, it must be noted that the word "commutation" derives from the Latin root, *mutare*, to change. According to the Shorter Oxford English Dictionary**,** this has the primary meaning of "the action

or process of changing or altering". In the same source, the primary meaning of the word "commute" is simply "to change" (*from or into*); to exchange.

This is suggestive of the reality of this case. The first sentence imposed on the appellant, which is a sentence of death, was changed or altered to a sentence of forty years Penal Servitude. By a statute of 1997 a person serving a sentence of Penal Servitude is to be regarded in law as serving a sentence of imprisonment. The notion of "serving a commutation" is a nonsense for it means "serving a change". The nature of the commutation is to be gleaned from the thing which is changed which was, in the first place, a *sentence* of death which was changed to a *sentence* of forty years Penal Servitude, in the State's own usage. This is, however, no less a *sentence*. By the Act of 1997 this second sentence was itself changed, for legal purposes into a sentence of imprisonment. Nor is there any mystery as to the meaning of the word "sentence". It derives from the Latin word *sententia* meaning, according to the Dictionary quoted above, "mental feeling, opinion or judgement and arises from the verb *sentire*, to feel. It has come to mean therefore "the opinion pronounced by a person on some particular question, an authoritative decision". It has a general meaning of "the judgement or decision of a court or tribunal", and has a secondary meaning of "the punishment to which a criminal is sentenced".

In Ireland at the relevant time (December 1985) the Court was bound to impose a death sentence on conviction of capital murder. The President was

bound to commute that sentence if so advised by the Government. It is clearly appropriate to describe the period of incarceration to which the appellant was condemned by the commutation by Act of the President on the advice of the then Government, as a sentence. The State itself so described it and resiled from this description only after it discovered that neither the Government nor the President had specified that there was to be no remission. But this has nothing to do with whether the forty year period is a "sentence".

I have no doubt that the prisoner is presently serving a sentence of imprisonment. I therefore concur that the Court should make a declaration:

> "That the plaintiff is a person who has been sentenced to a term of imprisonment exceeding one month and is, therefore, eligible, by good conduct, to earn remission under Order 59(1) of the Prison Rules 2007 and is also a person to whom the provisions in respect of the possibility of greater provision, found in Rule 59(2) of the Prison Rules 2007, apply".